Teo Chin Hwa v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J–05–67 OF 1998
NH CHAN, AHMAD FAIRUZ AND HAIDAR JJCA
9 DECEMBER 1999

Criminal Procedure *— Sentence — Plea of guilty — Possession of 156.3g mixture of heroin and monoacetylmorphine — Appellant sentenced to 18 years' imprisonment and ten strokes under s 39A(2) of Dangerous Drugs Act 1952 — Sentencing principles applied — Whether manifestly excessive and failure to apply right principles*

The appellant was originally charged for trafficking in 156.3g mixture of heroin and monoacetylmorphine (26.3g heroin and 130g monoacetylmorphine) under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the case for the prosecution, the learned judge amended the charge to s 12(2) and punishable under s 39A(2) wherein the appellant pleaded guilty to the amended charge and was accordingly convicted and sentenced to 18 years' imprisonment and ten strokes under s 39A(2). The sentence of imprisonment was ordered to run from the date of his arrest. The appellant appealed against the sentence.

Held, dismissing the appeal:

For this court to intervene, it must be shown that the sentence was manifestly excessive and that there was a failure on the part of the learned judge to apply the right principles. Dangerous drugs offences must be viewed seriously; the plea of guilty in this case is outweighed in favour of public interest. Further, the legislature had thought it fit to increase the punishment for offences under s 39A(2) of the Act. The legislative exercise therefore denoted the government's concern of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it posed to society itself (see pp 689H–690C).

[Bahasa Malaysia summary

Perayu didakwa pada asalnya untuk mengedar dadah dalam bentuk 156.3g campuran heroin dan monoacetylmorphine (26.3g heroin dan 130g monoacetylmorphine) di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Di akhir kes untuk pendakwaan, hakim yang arif telah mengubah pertuduhan kepada s 12(2) dan boleh dihukum di bawah s 39A(2) di mana perayu telah mengaku bersalah kepada pertuduhan yang dipinda dan beliau disabitkan dan dihukum 18 tahun penjara dan 10 sebatan rotan di bawah s 39A(2). Hukuman pemenjaraan diarahkan bermula dari tarikh penahanan. Perayu telah merayu terhadap hukuman tersebut.

Diputuskan, menolak rayuan tersebut:

Untuk mencelah, mahkamah mesti ditunjukkan bahawa hukuman tersebut adalah jelas melampau dan terdapat kegagalan di pihak

hakim yang arif untuk memakai prinsip yang betul. Kesalahan dadah berbahaya mesti dipandang dengan serius; pengakuan bersalah di dalam kes ini tidak sepenting kepentingan awam. Selanjutnya, perundangan telah berpendapat bahawa adalah sesuai untuk meningkatkan hukuman untuk kesalahan di bawah s 39A(2) Akta tersebut. Usaha perundangan dengan itu menunjukkan keprihatinan kerajaan terhadap masalah penyalahgunaan dadah di negara ini, kesan meruntuh penyalahgunaan dadah berbahaya dan juga bahaya yang sebenarnya kepada masyarakat itu sendiri (lihat ms 689H–690C).]

Notes

For cases on plea of guilty, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2863–2877.

Cases referred to

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Yeoh Eng Khuan [1976] 1 MLJ 238 (refd)

Legislation referred to

Criminal Justice Act 1953 s 3
Dangerous Drugs Act 1952 s 12(2), 39A(2), 39B(1)(a)

Appeal from: Criminal Trial No 45–21 of 1997 (High Court, Johor Bahru)

Teh Poh Teik (*Teh Poh Teik & Co*) for the appellant.
A Rashid bin Daud (Attorney General's Chambers) for the respondent.

Haidar JCA (delivering judgment of the court): The appellant pleaded guilty on the amended charge under s 12(2) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to 18 years' imprisonment and ten strokes under s 39A(2) of the Act by the High Court. The sentence of imprisonment was ordered to run from the date of his arrest, that is, 3 May 1997.

He appealed against the sentence only to this court. We heard his appeal on 20 April 1999. We dismissed his appeal and affirmed the sentence imposed by the High Court.

The appellant was originally charged for trafficking in 156.3g mixture of heroin and monoacetylmorphine (26.3g heroin and 130g monoacetylmorphine) under s 39B(1)(a) of the Act. At the end of the case for the prosecution, the learned judge amended the charge to s 12(2) and punishable under s 39A(2) of the Act wherein he pleaded guilty to the amended charge and was accordingly convicted and sentenced as stated above.

A The punishment under s 39A(2) of the Act is imprisonment for life or for a term which shall not be less than five years and shall also be liable to whipping of not less than ten strokes. The imposition of ten strokes is the minimum prescribed by the Act and that was the sentence meted out by the High Court. In the circumstances we shall only deal with whether the 18 years' imprisonment imposed by the High Court was manifestly B excessive that would warrant us to interfere with it.

Under s 3 of the Criminal Justice Act 1953, life imprisonment means 20 years. Therefore, in respect of the charge in which the appellant was convicted, the maximum sentence allowed under the Act would be 20 years' imprisonment

C In our view, it is beyond any question that what sort of sentence is to be imposed is within the court's discretion. In order for the appellant to persuade us to interfere with the sentence imposed he must show to us, sitting as the appellate court, that the learned judge clearly had erred in applying the correct principles in the assessment of the sentence (*PP v Loo Choon Fatt* [1976] 2 MLJ 256).

D After considering the mitigation put forward to the learned judge, this is what he said in his judgment in imposing the sentence (p 110 of the appeal record):

> In *Bahruni bin Ismail v PP* [1997] 2 MLJ 265, the Federal Court, in allowing an appeal against conviction on a charge of drug trafficking and substituting E therefor a conviction under s 12(2) and punishable under s 39A(2) of the Act where the amount of dangerous drug involved was 24.88g of heroin, sentenced the appellant to imprisonment for a term of 15 years and ten strokes of whipping. In *Muhammed Hassan v PP* [1998] 2 MLJ 273, the Federal Court, in allowing an appeal against conviction on a charge of drug trafficking and substituting therefor a conviction under s 6 of the Act where the amount F of dangerous drug involved was 1,784.8g of cannabis, sentenced the appellant to imprisonment for a term of 16 years with effect from the date of his arrest and ten strokes of whipping. In the instant case, the amount of dangerous drug involved was a mixture of 26.3g of heroin and 130g of monoacetylmorphine, which amount totalled 156.3g, an amount 31 times the minimum weight of 5g as provided under s 39A(2)(c) of the Act. Learned counsel for the accused G had drawn my attention to the case of *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 and submitted that a plea of guilty is in itself a mitigating factor and that it is generally accepted that the extent of reduction on account of plea of guilty would be between one-quarter and one-third of what would otherwise would have been the sentence. I am, however, of the view that no sentence can be assessed by a simple mathematical formula. To me, any H offence under the Act is a serious offence and I would be failing in my duty if I do not pass sentences which make it absolutely plain that those who indulge in such activities do receive sentences of utmost severity. In the instant case, the amount of dangerous drug involved is 26.3g of heroin and 130g of monoacetylmorphines and to me, a sentence to imprisonment for a term of 18 years is merited upon the facts of the case.

I The learned judge had followed the correct principles in the assessment of the sentence. Even if the sentence imposed may appear to be excessive but it must be shown to be *manifestly* excessive and that there was a failure on the part of the learned judge to apply the right principles for this court to

intervene. Dangerous drugs offences especially involving hard drugs like heroin and morphine must be viewed seriously and with the utmost contempt by the courts. It is a serious social problem in this country and the plea of guilty in the present case is outweighed in favour of the public interest. It has to be noted that the legislature had thought it fit to increase the punishment for offences under s 39A(2) of the Act from a maximum of 14 years' imprisonment to life imprisonment and the minimum term of imprisonment from three years to five years and the minimum strokes increased from six to ten strokes. The legislative exercise therefore denotes the government's concern of the problem of drug abuse in this country 'the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself' per Hashim Yeop Sani J (as he then was) in *PP v Loo Choon Fatt.* Unless the courts take a firm stand in such offences the whole purpose of the legislature in increasing the punishment under s 39A(2) of the Act would be lost (*PP v Yeoh Eng Khuan* [1976] 1 MLJ 238).

In considering an appeal on sentence, the Federal Court in *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83 stated at p 84A–C:

> ... this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.
>
> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

We were satisfied that the learned judge committed no error in the exercise of his discretion on the sentence imposed on the appellant and hence there were no grounds for us to interfere with it.

The appeal was dismissed and the sentence affirmed by us.

Appeal dismissed.

Reported by Chin En Tek